A

Chew Vee Lyn v David Mauricios Velez Hernandez

B

HIGH COURT (KUALA LUMPUR) — DIVORCE PETITION NO WA-33–404–07 OF 2019
FAIZAH JAMALUDIN J
23 JULY 2020

C

Family Law — Divorce — Contempt — Application to set aside — Cross-petition — Respondent failed to state his domicile in his cross-petition as required in Form 2 of the 1980 Rules renders his cross-petition defective — Whether court has jurisdiction to hear petition or cross-petition for divorce where parties were not domiciled in Malaysia at the time petition or cross-petition was presented — Rules of Court 2012 O 92 r 4 — Divorce and Matrimonial Proceedings Rules 1980 rr 102, 103

D

This was an application by the petitioner wife ('PW') to set aside the cross-petition filed by the respondent husband's ('RH') under rr 102 and 103 of the Divorce and Matrimonial Proceedings Rules 1980 ('the 1980 Rules') and O 18 r 19(1)(b), (c) or (d) and O 92 r 4 of the Rules of Court 2012 ('the ROC'). PW had raised a preliminary objection against RH's cross-petition on the grounds that: (a) RH was in contempt of the order of the court dated 25 March 2019 in Originating Summons No WA-24F-274–10 of 2018. He has yet to pay to PW the arrears for spousal maintenance and child maintenance in the sum of RM209,860.29 as ordered by the court; and (b) that RH had failed to purge his contempt of the court order as at the date of PW's filing of leave application for committal. PW was granted leave to commence committal proceedings against RH on 10 December 2019. PW's preliminary objection is dismissed on the following grounds: (i) PW failed to serve a show cause letter on RH under O 52 r 2B of the ROC before filing her exparte application for leave to apply for order of committal; and (ii) PW had not affected personal service on RH of the cause papers for the committal proceedings prior to the date of the hearing of the enc 11, neither did she seek apply to the court to dispense with personal service of the cause papers under O 52 r 4(4) of the ROC.

E

F

G

H

Held, allowing the PW's application in encl 11 and dismissing the cross-petition:

I

(1) The applicable test in determining whether a petitioner had acquired a domicile of choice in Malaysia was not whether the petitioner intends to stay in Malaysia but whether he intended to stay in Malaysia indefinitely without ever returning to his domicile of origin or ever changing his

domicile of choice from Malaysia to another domicile of choice. In weighing RH's contention that his domicile of choice was Malaysia against the facts and evidence in this case and RH's own conduct, the court found that his averment that his domicile of choice was Malaysia because his marriage to PW was registered here; the child of the marriage was born and raised in Malaysia; his shareholding and directorship of Vida Fitness Sdn Bhd; he maintained bank accounts in Malaysia; was paying taxes in Malaysia and an employee of GR Technologies, against the facts and circumstances surrounding these contentions, did not evince that RH had abandoned the country of Columbia as his domicile of origin and he had formed the intention to live in Malaysia indefinitely. For these reasons, RH had failed to satisfy the court that he had completely abandoned his domicile of origin with the intention of never returning and that he had freely formed the intention of residing in Malaysia indefinitely (see paras 18 & 20–21).

(2) The court found that RH's failure to state his domicile in his cross-petition as required in Form 2 of the 1980 Rules renders his cross-petition defective. Pursuant to s 48(1)(c) of the Law Reform (Marriage and Divorce) Act 1976, the court did not have the jurisdiction to hear a petition or cross-petition for divorce where the parties were not domiciled in Malaysia at the time petition or cross-petition was presented. As RH failed to prove to the satisfaction of court that his domicile of choice was in Malaysia at the time he filed his cross-petition, his cross-petition was obviously unsustainable and was accordingly frivolous and vexatious. The court found that RH's action of filing the cross-petition when his domicile was not in Malaysia and his failure to state his domicile in the cross-petition was an abuse of the court's process (see paras 23–24).

[Bahasa Malaysia summary

Ini adalah permohonan oleh isteri pempetisyen ('PW') untuk mengenepikan petisyen balas yang difailkan oleh suami responden ('RH') di bawah k 102 dan 103 Kaedah-Kaedah Prosiding Perceraian dan Hal-Ehwal Suami Isteri 1980 ('Kaedah 1980') dan A 18 k 19(1)(b), (c) atau (d) dan A 92 k 4 Kaedah-kaedah Mahkamah 2012 ('KKM'). PW telah membangkitkan bantahan awal terhadap petisyen balas RH dengan alasan bahawa: (a) RH menghina perintah mahkamah bertarikh 25 Mac 2019 melalui Saman Pemula No WA-24F-274–10 Tahun 2018. Beliau masih belum membayar kepada PW tunggakan untuk nafkah suami-isteri dan nafkah anak berjumlah RM209,860.29 seperti yang diperintahkan oleh mahkamah; dan (b) bahawa RH telah gagal mengakas penghinaan beliau terhadap perintah mahkamah pada tarikh PW memfailkan permohonan kebenaran untuk pengkomitan. PW dibenarkan kebenaran untuk memulakan prosiding pengkomitan terhadap RH pada 10 Disember 2019. Bantahan awal PW ditolak dengan alasan

berikut: (i) PW gagal menyerahkan surat tunjuk sebab kepada RH di bawah A 52 k 2B KKM sebelum mengfailkan permohonan ex parte kebenaran untuk memohon perintah pengkomitan; dan (ii) PW tidak menyempurnakan penyampaian secara peribadi kepada RH bagi kertas-kertas kausa untuk prosiding pengkomitan sebelum tarikh perbicaraan lampiran 11, dan beliau juga tidak memohon kepada mahkamah untuk dikecualikan daripada melakukan penyampaian secara peribadi kertas-kertas kausa tersebut di bawah A 52 k 4(4) KKM.

Diputuskan, membenarkan permohonan PW di lampiran 11 dan menolak petisyen balas:

(1) Ujian yang diguna pakai untuk menentukan sama ada seorang pemohon telah memperoleh domisil pilihan di Malaysia bukanlah sama ada pemohon berniat untuk menetap di Malaysia tetapi sama ada beliau berniat untuk menetap di Malaysia selama-lamanya tanpa kembali ke domisil asalnya ataupun mengubah domisil pilihan dari Malaysia ke domisil pilihan yang lain. Dalam menimbang pendapat RH bahawa dominasi pilihan beliau adalah di Malaysia pada fakta dan keterangan dalam kes ini dan tingkah laku RH sendiri, mahkamah mendapati bahawa dakwaan bahawa domisil pilihan beliau adalah Malaysia kerana perkahwinannya dengan PW didaftarkan di sini; anak hasil perkahwinan tersebut dilahirkan dan dibesarkan di Malaysia; pegangan saham dan jawatan pengarahnya Vida Fitness Sdn Bhd; beliau mempunyai akaun bank di Malaysia; membayar cukai di Malaysia dan seorang pekerja di GR Technologies, berdasarkan fakta dan keadaan di sebalik pertikaian ini, tidak membuktikan bahawa RH telah meninggalkan negara Columbia sebagai domisil asalnya dan beliau telah mengukuhkan niat untuk tinggal di Malaysia selama-lamanya. Atas sebab-sebab ini, RH gagal meyakinkan mahkamah bahawa beliau telah sepenuhnya meninggalkan domisil asalnya dengan niat untuk tidak akan kembali dan bahawa beliau dengan bebas telah mengukuhkan niat untuk menetap di Malaysia selama-lamanya (lihat perenggan 18 & 20–21).

(2) Mahkamah mendapati bahawa kegagalan RH untuk menyatakan domisil beliau dalam petisyen balasnya seperti yang diperuntukkan dalam Borang 2 dari Kaedah 1980 menjadikan petisyen balasnya cacat. Berdasarkan s 48(1)(c) Akta Pembaharuan Undang-Undang (Perkahwinan dan Perceraian) 1976, mahkamah tidak memiliki bidang kuasa untuk mendengar petisyen atau petisyen silang untuk perceraian di mana pihak-pihak tidak menetap di Malaysia pada saat petisyen atau petisyen silang dikemukakan. Oleh kerana RH telah gagal membuktikan demi kepuasan mahkamah bahawa domisil pilihannya adalah di Malaysia pada saat beliau memfailkan petisyen balasnya, petisyen balasnya jelas tidak dapat dipertahankan dan oleh itu adalah remeh dan menyusahkan. Mahkamah mendapati bahawa tindakan RH memfailkan

petisyen balas apabila domisilnya bukan di Malaysia dan kegagalan beliau untuk menyatakan domisilnya dalam petisyen silang adalah penyalahgunaan proses mahkamah (lihat perenggan 23–24).]

Cases referred to

Henderson v Henderson [1965] 1 All ER 179 (refd)
Fuld's Estate (No 3), Re [1966] 2 WLR 717 (refd)
James Sloan v Sarala Devi Sloan [2010] 9 MLJ 670; [2010] 4 CLJ 483; [2010] 8 AMR 185, HC (refd)
Joseph Wong Phui Lun v Yeoh Loon Goit [1978] 1 MLJ 236 (refd)
Melvin Lee Campbell v Amy Anak Edward Sumek [1988] 2 MLJ 338; [1988] 1 LNS 19 (refd)
Tan Boon Thien & Anor v Tan Poh Lee & Ors [2020] MLJU 829; [2020] 3 CLJ 28, CA (refd)
Tan Sri Dato' (Dr) Rozali Ismail & Ors v Lim Pang Cheong @ George Lim & Ors [2012] 3 MLJ 458; [2012] 2 CLJ 849; [2012] 2 AMR 429, FC (refd)

Legislation referred to

Divorce and Matrimonial Proceedings Rules 1980 rr 102, 8, 103, Form 2
Law Reform (Marriage and Divorce) Act 1976 s 48(1)(c)
Rules of Court 2012 O 18 r 19(1)(b), (1)(c), (1)(d), O 52 rr 2B, 4(3), (4), O 92 r 4

Sudesh Kumar (Gan Soon Ong with him) (Scully Yoon) for the petitioner wife.
Nicole Wee (Ling Li Ching with her) (Chooi & Company + Cheang & Ariff) for the respondent husband.

Faizah Jamaludin J:

APPLICATION

[1] This is the petitioner wife's ('PW') application to set aside the respondent husband's ('RH') cross-petition under rr 102 and 103 of the Divorce and Matrimonial Proceedings Rules 1980 ('the 1980 Rules') and O 18 r 19(1)(b), (c) or (d) and O 92 r 4 of the Rules of Court 2012 ('the ROC').

[2] PW had raised a preliminary objection against RH's cross-petition on the grounds that:

(a) RH is in contempt of the order of this court dated 25 March 2019 in Originating Summons No WA-24F-274–10 of 2018. He has yet to pay to PW the arrears for spousal maintenance and child maintenance in the sum of RM209,860.29 as ordered by this court; and

(b) that RH had failed to purge his contempt of the court order as at the date of PW's filing of leave application for committal.

[3] PW was granted leave to commence committal proceedings against RH on 10 December 2019. A

PW'S PRELIMINARY OBJECTION

[4] PW's preliminary objection is dismissed on the following grounds: B

(a) PW failed to serve a show cause letter on RH under O 52 r 2B of the ROC before filing her ex parte application for leave to apply for order of committal. By the principle of stare decisis, this court is bound by the decision of the Court of Appeal in *Tan Boon Thien & Anor v Tan Poh Lee & Ors* [2020] MLJU 829; [2020] 3 CLJ 28, which was delivered on 30 October 2019 ie before PW was granted leave to commence committal proceedings on RH; and C

(b) PW had not affected personal service on RH of the cause papers for the committal proceedings prior to the date of the hearing of this encl 11, neither did she seek apply to this court to dispense with personal service of the cause papers under O 52 r 4(4) of the ROC. D

[5] Order 52 r 4(3) and 4(4) of the ROC states that: E

(3) Subject to paragraph (4), the notice, accompanied by a copy of the statement and affidavit in support of the application for leave under rule 3 and the order granting such leave, must be served personally on the person sought to be committed.

(4) Without prejudice to the powers of the Court or Judge under Order 62, rule 5, the Court or Judge may dispense with service of the notice under this rule if it or he thinks it just to do so. F

[6] The Federal Court in *Tan Sri Dato' (Dr) Rozali Ismail & Ors v Lim Pang Cheong @ George Lim & Ors* [2012] 3 MLJ 458; [2012] 2 CLJ 849; [2012] 2 AMR 429, held that because of the quasi-criminal nature of contempt proceedings, procedural requirements governing contempt proceedings must be strictly complied with. G

PW'S STRIKING-OUT APPLICATION H

[7] RW failed to plead his domicile in the cross-petition as required in Form 2 of the Schedule to the Divorce and Matrimonial Proceedings Rules 1980 ('the 1980 Rules'). I

[8] Rule 8 of the 1980 Rules states as follows:

8 Contents of Petition

(1) Unless otherwise directed, *every petition, other than a petition under Rule 80 or*

A *81, shall contain the information required by Form 2 as near as may be* in the order there set out and any further or other information required by such of the following paragraphs of this Rule as may be applicable. (Emphasis added.)

B **[9]** One of the information required in Form 2 is the domicile of the petitioner and the respondent. The Court of Appeal *Tan Boon Thien & Anor v Tan Poh Lee & Ors* citing with approval a plethora of case law on the meaning of the word 'shall' held that the word 'shall' in statutory provisions requires mandatory compliance.

C **[10]** Even if RH had pleaded his domicile is Malaysia, based on the facts of this case, this court finds that RH has failed to prove to the satisfaction of this court that he had acquired a domicile of choice in Malaysia at the time he filed the cross-petition on 29 August 2019.

D **[11]** It is settled law that the petitioner must prove that he had abandoned his domicile of origin and acquired a domicile of choice in Malaysia at the time of the presentation of the petition (see *Melvin Lee Campbell v Amy Anak Edward Sumek* [1988] 2 MLJ 338; [1988] 1 LNS 19).

E **[12]** A petitioner's residence in Malaysia is not sufficient for him to prove that he had displaced his domicile of origin in favour of Malaysia as his domicile of choice. The High Court in *James Sloan v Sarala Devi Sloan* [2010] 9 MLJ 670; [2010] 4 CLJ 483; [2010] 8 AMR 185, and in *Melvin Lee*
F *Campbell v Amy Anak Edward Sumek* held that for a petitioner husband to establish that he had abandoned his domicile of origin and acquired a domicile of choice in Malaysia, the petitioner must prove the following:

(a) that he freely formed the intention to reside in Malaysia indefinitely;

G (b) that the intention to reside in Malaysia was made independently free of any external pressures; and

(c) that he has no intention of ever returning to his domicile of origin.

H **[13]** Scarman J (later Lord Scarman) in *Re Fuld's Estate (No 3)* [1966] 2 WLR 717, after comprehensively reviewing previous case laws on the law of domicile held that:

(1) The *domicile of origin* adheres — unless displaced by satisfactory evidence of the acquisition and continuance of a domicile of choice;

I (2) a d*omicile of choice is acquired only if it be affirmatively shown that the propositus is resident within a territory subject to a distinctive legal system with the intention, formed independently of external pressures, of residing there indefinitely* ...

(3) It follows that, though a man has left the territory of his domicile of origin with the intention of never returning, though he be resident in a new territory, *yet if his*

mind be not made up or evidence be lacking or unsatisfactory as to what is his state of mind, his domicile of origin adheres. And, if he has acquired but abandoned a domicile of choice either because he no longer resides in the territory or because he no longer intends to reside there indefinitely, the domicile of origin revives until such time as by a combination of residence and intention he acquires a new domicile of choice.

What has to be proved is no mere inclination arising from a passing fancy or thrust upon a man by an external but temporary pressure, but an intention freely formed to reside in a certain territory indefinitely. *All the elements of the intention must be shown to exist if the change is to be established: if any one element is not proved, the case for a change fails.* (Emphasis added.)

[14] Clear evidence is required to establish a change of domicile. In particular, to displace the domicile of origin in favour of the domicile of choice, the standard of proof goes beyond a mere balance of probabilities: see *Henderson v Henderson* [1965] 1 All ER 179; *Joseph Wong Phui Lun v Yeoh Loon Goit* [1978] 1 MLJ 236. In *Joseph Wong Phui Lin*, the Singapore High Court held that 'the oath of the person whose domicile is in question as to his intention to change his domicile is not conclusive. The question is for the Court is whether upon a review of all the circumstances it gives credit to his evidence'.

[15] The High Court in *Melvin Lee Campbell v Amy Anak Edward Sumek* held that the court must weigh carefully the evidence against the propositus' cause of conduct. The learned judge quoted with approval the following passage from *Halsbury's Laws of England* (4th Ed):

434 Direct and secondary evidence of intention

Direct evidence of intention is often not available, but a person whose domicile is in question may himself give evidence of his intentions, present or past. Evidence of this nature is to be accepted with considerable reserve, even though no suspicion may be entertained of the truthfulness of the witness.

Expressions of intention, written or oral, may be given in evidence, but such evidence must be carefully weighed in connection with the circumstances in which it occurred, and even if the expressions are clear and consistent they cannot prevail against a course of conduct leading to an opposite inference.

[16] In this present case, RH contends that he had abandoned his domicile of origin of Columbia and that he had acquired a domicile of choice in Malaysia. He avers in para 9 of his affidavit in reply affirmed on 19 October 2019 that 'Columbia is my domicile of origin. However, I have long abandoned my domicile of origin and have adopted a domicile of choice in Malaysia. My intention has always been to settle down in Malaysia and establish my career and my family in Malaysia'.

[17] RH claims the fact the parties' marriage was registered in Malaysia and they had co-habited in Malaysia throughout the marriage; the child of the marriage was born in Malaysia and raised in Malaysia; that he is a director and shareholder of Vida Fitness Sdn Bhd with PW; that he maintains a bank account in Maybank and HSBC; that he has been paying taxes in Malaysia; and that he is an employee of GR Technologies Sdn Bhd is proof that he intends to reside in Malaysia.

[18] The applicable test in determining whether a petitioner has acquired a domicile of choice in Malaysia is not whether the petitioner intends to stay in Malaysia but whether he intends to stay in Malaysia indefinitely without ever returning to his domicile of origin or ever changing his domicile of choice from Malaysia to another domicile of choice.

[19] RH does not aver that he has 'burnt his boat' and that he never intends to return to his domicile of origin. The fact that his marriage to PW was registered in Columbia before it was registered in Malaysia and the fact that he had caused the birth of the child of the marriage to be registered in Columbia, even though the child was born in Malaysia, shows that RH did not completely abandon the territory of Columbia.

[20] In weighing RH's contention that his domicile of choice is Malaysia against the facts and evidence in this case and RH's own conduct, this court finds that his averment that his domicile of choice is Malaysia because his marriage to PW is registered here; the child of the marriage is born and raised in Malaysia; his shareholding and directorship of Vida Fitness Sdn Bhd; he maintains bank accounts in Malaysia; is paying taxes in Malaysia and an employee of GR Technologies, against the facts and circumstances surrounding these contentions, does not evince that RH had abandoned the country of Columbia as his domicile of origin and he had formed the intention to live in Malaysia indefinitely. This is because the facts show that Vida Fitness is no longer in operation and owes the Government of Malaysia unpaid taxes — this can be seen from the letter from the Lembaga Hasil Dalam Negri ('LHDN') to Vida Fitness. As mentioned above, his marriage to PW was registered in Columbia before it was registered in Malaysia and the birth of the child was registered in Columbia even though she was born in Malaysia. Furthermore, the evidence shows that RH only has the minimal sum of RM1,250 and RM2,579.53 in his bank accounts in Malaysia. RH's claim that he is an employee of GR Technologies Sdn Bhd and is a tax payer in Malaysia is a bare averment. He did not provide any evidence of his employment with GR Technologies Sdn Bhd or that he is a tax payer in Malaysia. He did not exhibit his contract of employment or even a salary slip from GR Technologies Sdn

Bhd to show that he is an employee of the company. Neither did he exhibit any tax returns filed with the LHDN to show that he is a tax payer and that he had paid taxes in Malaysia as claimed.

[21] For these reasons, RH has failed to satisfy this court that he has completely abandoned his domicile of origin with the intention of never returning and that he has freely formed the intention of residing in Malaysia indefinitely.

[22] Accordingly, this court finds that RH had failed to prove to the satisfaction of this court that his domicile of choice is Malaysia.

[23] Furthermore, this court finds that RH's failure to state his domicile in his cross-petition as required in Form 2 of the 1980 Rules renders his cross-petition defective.

[24] Pursuant to s 48(1)(c) of the Law Reform (Marriage and Divorce) Act 1976, this court does not have the jurisdiction to hear a petition or cross-petition for divorce where the parties are not domiciled in Malaysia at the time petition or cross-petition is presented. As RH failed to prove to the satisfaction of this court that his domicile of choice is in Malaysia at the time he filed his cross-petition, his cross-petition is obviously unsustainable and is accordingly frivolous and vexatious.

[25] This court finds that RH's action of filing the cross-petition when his domicile is not in Malaysia and his failure to state his domicile in the cross-petition is an abuse of this court's process.

DECISION

[26] For these reasons, the PW's application in encl 11 is allowed and RH cross-petition is hereby struck out.

[27] Cost is in the cause.

Enclosure 11 allowed and cross-petition dismissed.

Reported by Nuzul Fitrie